

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA ex rel.

ROGER L. SANDERS, et al.,

Relators,

v.

ALLISON ENGINE COMPANY, INC., et al.,

Defendants.

Civil Action No. C-1-99-970
(Consolidated with No. C-1-99-923)

Judge Rose

**SOUTHERN OHIO FABRICATORS, INC.'S SUPPLEMENTAL PROPOSED
JURY INSTRUCTIONS**

For Defendant Southern Ohio Fabricators, Inc.:

Lawrence R. Elleman, Esq.
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
E-mail: larry.elleman@dinslaw.com
*Counsel for Defendant
Southern Ohio Fabricators*

INTRODUCTION

Southern Ohio Fabricators, Inc. adopts and incorporates by reference the proposed instructions submitted by it and the other Defendants filed contemporaneously herewith. In addition, Southern Ohio Fabricators submits these additional instructions with regard to issues unique to it.

DEFENDANT SOUTHERN OHIO FABRICATORS
REQUESTED INSTRUCTION NO. 1
LACHES

Southern Ohio Fabricators has argued that Relators' claims against Southern Ohio Fabricators are barred by the doctrine of laches. Specifically, Southern Ohio Fabricators argues that the Government's delay in investigating its claim against the defendant bars the Government from asserting its claims against Southern Ohio Fabricators under the doctrine of laches. The elements of the defense of laches are: (1) a plaintiff's unreasonable delay or lapse of time in bringing a claim against the defendant; and (2) that the plaintiff's unreasonable delay caused prejudice to the defendant. Thus, if you conclude that Southern Ohio Fabricators has demonstrated both of these elements by a preponderance of the evidence, you must find that Relators' claims against Southern Ohio Fabricators are barred by the doctrine of laches.

Source: Environmental Defense Fund, et al., v. Tennessee Valley Authority, et al., 468 F.2d 1164, 1182 (6th Cir. 1975); Bylinski v. City of Allen Park, 169 F.3d 1001, 1003 (6th Cir. 1999), overruled in part on other grounds by Syngenta Crop. Prot., Inc. v. Henson, (2002), 537 U.S. 28.

DEFENDANT SOUTHERN OHIO FABRICATORS'
REQUESTED INSTRUCTION NO. 2
EQUITABLE ESTOPPEL

Southern Ohio Fabricators has argued that Relators' claims against Southern Ohio Fabricators are barred by the doctrine of equitable estoppel. In this case, to prevail on the defense of equitable estoppel, Southern Ohio Fabricators must prove the following elements:

- (1) Affirmative misrepresentation by the Government;
- (2) Reasonable reliance by Southern Ohio Fabricators on the Government's misrepresentation;
- (3) Detriment to Southern Ohio Fabricators if the Government is permitted to deny the existence of the misrepresentation.

If you conclude that Southern Ohio Fabricators has demonstrated all three of these elements by a preponderance of the evidence, you must find that Relators' claims against Southern Ohio Fabricators are barred by the doctrine of equitable estoppel.

Source: Counsel for Southern Ohio Fabricators was unable to locate an applicable model jury instruction for equitable estoppel in the sources recommended by this Court. Although Sixth Circuit authority states that a party attempting to estop the government must demonstrate affirmative misconduct by the government in addition to the other estoppel elements, Michigan Express, Inc., et al., v. United States, 374 F.3d 424 (6th Cir. 2004), Southern Ohio Fabricators believes this authority is inapplicable to cases in which the party asserting estoppel is seeking to prevent the Government from suing to recover a statutory forfeiture or penalty. *See* Gressley v. Califano, 609 F.2d 1265, 1268 (7th Cir. 1979); United States v. Fox Lake State Bank, 366 F.2d 962, 965-966 (7th Cir. 1966).

SPECIAL VERDICT FORMS

Question 1.

Did Southern Ohio Fabricators prove by a preponderance of the legal evidence that Relators unreasonably delayed bringing its claim against Southern Ohio Fabricators?

YES _____ NO _____

Did Southern Ohio Fabricators prove by a preponderance of the legal evidence that the Relators' unreasonable delay caused prejudice to Southern Ohio Fabricators?

YES _____ NO _____

Question 2.

Did Southern Ohio Fabricators prove by a preponderance of the legal evidence that the Government agency made an affirmative misrepresentation to Southern Ohio Fabricators that it was not a target of its investigation?

YES _____ NO _____

Did Southern Ohio Fabricators prove by a preponderance of the legal evidence that it reasonably relied upon that misrepresentation?

YES _____ NO _____

Did Southern Ohio Fabricators prove by a preponderance of the legal evidence that it suffered a detriment as a result of its reasonable reliance?

YES _____ NO _____

s/ Lawrence R. Elleman
Lawrence R. Elleman, Esq.
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
E-mail: larry.elleman@dinslaw.com
Counsel for Defendant
Southern Ohio Fabricators

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2005, a copy of the foregoing was served on the following via Courts EF/CMF Filing System or by U.S. mail, postage prepaid to all Counsel not registered:

David Kamp, Esq.
White Getgey & Meyer
1700 4th & Vine Tower
Cincinnati, Ohio 45202

Susan A. Mitchell, Esq.
McKenna Long & Aldridge, L.L.P.
444 South Flower Street
Los Angeles, CA 90071-2901

Gerald F. Kaminski, Esq.
Assistant United States Attorney
220 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Glenn V. Whitaker, Esq.
Victor A. Walton, Esq.
Vorys, Sater, Seymour & Pease, LLP
Atrium Two, Suite 2100
Cincinnati, Ohio 45202

James B. Helmer, Jr., Esq.
Helmer, Martins & Morgan Co., L.P.A.
Fourth & Walnut Centre, Suite 1900
105 East Fourth Street
Cincinnati, OH 45202

William A. Posey
Keating, Muething & Klekamp, P.L.L.
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202

Scott A. Powell, Esq.
Hare, Wynn, Newell & Newton, LLP
The Massey Bldg., Suite 800
290 21st Street, North
Birmingham, AL 35203-3713

Paul J. Wogaman, Sr.
United States Department of Justice
Civil Division
P.O. Box 261
Washington, D.C. 20044

s/ Lawrence R. Elleman
Lawrence R. Elleman, Esq.
DINSMORE & SHOHL, LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
E-mail: larry.elleman@dinslaw.com
Counsel for Defendant
Southern Ohio Fabricators